84-793

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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ADJUSTERS REPLACE-A-CAR, INC.,
Petitioner,

v.

AGENCY RENT-A-CAR, INC.,
Respondent.

WAKELY & ASSOCIATES, INC.,
Petitioner,

v.

AGENCY RENT-A-CAR, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Petitioners were denied due process of law by the Court of Appeals' failure to grant a new trial in circumstances where a jury was never permitted to determine the disputed issue of fact found to be central to the litigation.

2. Whether low barriers to market entry preclude a finding of attempt to monopolize.

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties to the proceedings in the Court of Appeals and the District Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

JURISDICTION 2

PROVISIONS OF STATUTES, CONSTITUTION AND RULES INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 5

I. The Petitioners Were Denied Due Process Of Law By The Court Of Appeals' Failure To Grant A New Trial 5

II. Low Barriers To Market Entry Do Not Preclude A Finding Of Attempt To Monopolize 16

CONCLUSION 17

APPENDIX:

App. A: Fifth Circuit Opinion, July 9, 1984 ..... 1a

App. B: Fifth Circuit Denial of Petition for Rehearing and Suggestion that Rehearing Be Had En Banc 22a

App. C: District Court's Order Granting Defendant's Motion for Judgment Notwithstanding the Verdict 24a

App. D: Jury Verdict 25a

TABLE OF AUTHORITIES

CASES: Page

Compton v. United States, 377 F.2d 408 (8th Cir. 1967) 15

Franks v. National Dairy Products Corp., 414 F.2d 682 (5th Cir. 1969) 15

International Air Industries, Inc. v. American Excelsior Co., 517 F.2d 714 (5th Cir. 1975) 6, 10

Jenkins v. General Motors Corp., 446 F.2d 377 (5th Cir. 1971) 15

Malcolm v. Marathon Oil Co., 642 F.2d 845 (5th Cir. 1981) 6, 10

Multiflex, Inc. v. Samuel Moore & Co., 709 F.2d 980 (5th Cir. 1983) 16

Neely v. Martin K. Ely Construction Co., 386 U.S. 317, 87 S.Ct. 1072 (1967) 15

Pac. Eng. & Prod. Co. of Nev. v. Kerr McGee Corp., 551 F.2d 790 (10th Cir. 1977) 11

Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 64 S.Ct. 724 (1944) 15

Seaboard Surety Company v. First National Bank of Montgomery, 263 F.2d 868 (5th Cir. 1959) 15

Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 87 S.Ct. 1326, 18 L.Ed.2d 406 (1967) 6

Webster v. Offshore Food Service, Inc., 434 F.2d 1191 (5th Cir. 1970) 15

STATUTES, CONSTITUTION AND RULES:

15 U.S.C. § 2 (Sherman Act) 2

15 U.S.C. § 15 (Clayton Act) 3

Fifth Amendment, U.S. Constitution 3

Seventh Amendment, U.S. Constitution 3

TABLE OF AUTHORITIES continued

Page

Federal Rules of Civil Procedure 50(b) 3

Federal Rules of Civil Procedure 59(a) 4

OTHER AUTHORITIES:

Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975) 11, 14

Vawter & Zuch, *A Critical Analysis of Recent Federal Appellate Decisions in Predatory Pricing*, 51 Antitrust L. J. 401 (1983) 7

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Adjusters Replace-A-Car, Inc., and Wakely & Associates, Inc., respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit filed July 9, 1984.

OPINIONS BELOW

The opinion, dated July 9, 1984, of the Court of Appeals for the Fifth Circuit, is reported in 735 F.2d 884. The opinion is reprinted in the Appendix hereto beginning at page 1a. Petitioners' Petition for Rehearing and Suggestion that Rehearing Be Had En Banc was denied without opinion on August 20, 1984. A copy of the notification is reprinted in the Appendix at 22a. The Order Granting Defendant's Motion for Judgment Notwithstanding the Verdict of the United States District Court for the Western District of Texas, San Antonio Division filed January 18, 1983, is not reported. The order is reprinted in the Appendix hereto, at page 24a. The verdict of the Jury entered Novemer 15, 1982, is reproduced in the Appendix beginning at page 25a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on July 9. 1984. A timely petition for rehearing was denied on August 20, 1984, and this petition for writ of certiorari is filed within 90 days of that date.

PROVISIONS OF STATUTES, CONSTITUTION AND RULES INVOLVED

Statutes

Sherman Act

Section 2. "Every person who shall . . . . attempt to monopolize any part of the trade or

commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." (15 U.S. Code, Sec. 2)

Clayton Act

Section 4. "That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (15 U.S. Code, Sec. 15)

Constitution

The Fifth Amendment to the United States Constitution provides in pertinent part:

"No person shall be deprived of life, liberty, or property, without due process of law . . . ."

The Seventh Amendment to the United States Constitution provides in pertinent part:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise examined in any Court of the United States, than according to the rules of the common law.

Rules

Rule 50(b) of the Federal Rules of Civil Procedure provides in pertinent part:

. . . a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict . . .

Rule 59(a) of the Federal Rules of Civil Procedure provides in pertinet part:

> . . . A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States . . .

STATEMENT OF THE CASE

Adjusters Replace-A-Car, Inc., ("Adjusters") filed its original complaint herein on June 29, 1978. Wakely & Associates, Inc., d/b/a Wakely Auto Rentals ("Wakely"), filed its original complaint on October 31, 1979. Their causes of action against Agency Rent-A-Car, Inc. ("Agency"), are founded upon a violation of the Antitrust laws, specifically Section 2 of the Sherman Act (15 U.S.C. § 2), and resulting injury and damage. In December, 1981, the two cases were consolidated over the objection of Adjusters and Wakely.

The consolidated cases were tried to a jury beginning on November 8, 1982. The jury found that Agency had attempted to monopolize the insurance replacement car market in San Antonio, Austin and Corpus Christi, that Plaintiffs had been injured as a result thereof, and that Adjusters and Wakely suffered damages aggregating $550,000.00 and $250,000.00 respectively.

Adjusters and Wakely filed a Motion for Entry of Judgment. Agency filed a Motion for Judgment

and/or Partial Judgment Notwithstanding the Verdict and a Motion for New Trial.

On January 18, 1983, the Trial Court entered its Order Granting Defendant's Motion for Judgment Notwithstanding the Verdict and its Judgment dismissing the case with prejudice. On January 27, 1983, the Trial Court overruled Agency's conditional Motion for New Trial.

On July 9, 1984, the Fifth Circuit Court of Appeals affirmed the District Court's order. It did so in a fashion which denies Petitioners' due process and the right to trial by a jury.

It sustained the J.N.O.V. on the grounds that the "record will not support a finding that Agency's price was ever inadequate to cover its average variable costs." (17a).

REASONS FOR GRANTING THE WRIT

I.

The Petitioners Were Denied Due Process Of Law By The Court Of Appeals' Failure To Grant A New Trial

Prior to the decision in this case, it was unclear as to what, if any, cost based standard was applicable in proving a *prima facie* case of predatory pricing in the Fifth Circuit.

Even though advocated by the Defendant, the Trial Court, at every opportunity, refused to apply a rule requiring that Agency's price be below average variable costs in order to be considered predatory. It held that only prices which exceed total costs could not be considered predatory.

This was consistent with what the Fifth Circuit rule, albeit unclear, seemed to be at the time. That rule was contained in *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975). That opinion seemingly held that a price would be considered predatory *per se* if it is below average variable cost. However, because of the language in *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685, 696, n.12, 702 n.14, 87 S.Ct. 1326, 18 L.Ed.2d 406 (1967), the Fifth Circuit in *American Excelsior* expressed uncertainty as to what showing was required in order to make out a *prima facie* case. Its hesitancy to apply the variable cost standard was prompted by this Court's use of the term "deteriorating price structure" in its *Utah Pie* opinion. *Id.* at 724.

The Trial Court's unwillingness to apply the average variable cost standard in light of the uncertainty expressed in *American Excelsior* is further supported by the Fifth Circuit's decision in *Malcolm* v. *Marathon Oil Co.*, 642 F.2d 845 (5th Cir. 1981) in which a directed verdict for defendant was reversed on a record which did not demonstrate prices below average variable cost, but merely a deteriorating price structure. Though *Malcolm* recognized the raging controversy and set out the various views on the matter with respect to whether average variable costs should be the standard for measuring predatory pricing, it stated that:

> This Court needed not presently offer its views on the debate. *Id.* 854 f.n.17.

It is certainly reasonable to conclude from this comment that the law was unsettled in the Fifth Circuit.

At the time of the trial in this case, other circuits had offered their views with respect to the debate. Though there was neither consistency nor harmony among the circuits, there was certainly support for using average total costs, as opposed to average variable costs, not the least of which was this Court's *Utah Pie* decision.

Confirmation that the law in the Fifth Circuit was perceived to be unclear even to scholars of antitrust law was published shortly after the trial in this case. See Vawter & Zuch, *A Critical Analysis of Recent Federal Appellate Decisions in Predatory Pricing,* 51 Antitrust L.J. 401 (1983), where it interprets *American Excelsior* as follows:

> . . . the predatory pricing question arose within the context of determining *whether or not predation had been proved by the plaintiff as a matter of law.* The Fifth Circuit affirmed the jury's verdict for the defendant and embraced a modified version of the Areeda-Turner test. *However, the opinion failed to delineate clearly the proof a plaintiff must demonstrate in order to prevail on a charge of predatory pricing.* (Emphasis added) *Id.* 404-5.

The Trial Court not only declined to instruct on below average variable cost pricing, it restricted Plaintiffs' attempt to controvert Agency's proof with respect thereto and refused to order Defendants to produce documents reflecting their costs.

With respect to the need for Plaintiffs to put on proof with respect to average variable costs, the following colloquy with the Trial Court took place:

THE COURT: Let me ask one more question. You answered these interrogatories, somebody for the company answered these requests for admissions saying the San Antonio division lost money at the seven dollar rate, and then when we looked at Defendant's A and B it showed in a couple of months it lost money and a couple of months it made money. Is the way to associate those two together, make both of them accurate, the fact that if you apportioned your regional expenses to San Antonio, then the answer to the admission is accurate?

A. That is correct, your Honor.

THE COURT: But if you don't apportion your regional expenses to San Antonio, then the San Antonio operations, at least in the two months, were profitable?

A. That is correct.

MR. TONDRE: Your Honor, I find myself in the position of having to go through each of these individual costs.

THE COURT: Can't do it, won't do that.

MR. TONDRE: Well, may we approach the bench, your Honor?

THE COURT: Yes.

(Thereupon, the following proceedings were held at the bench.)

THE COURT: Now, I understand, I understand these offices weren't profitable. The answers to the interrogatories were right.

MR. TONDRE: Let me tell you what my problem is. You are thinking about giving an instruction on predatory pricing.

THE COURT: No, I am not. I am thinking about giving their exact instruction on below cost price

> is not an attempt to monopolize unless it is motivated by a specific intent to monopolize and has a dangerous probability of success.
>
> MR. TONDRE: Let me tell you the problem I have got. I don't want to go through this any more than you do but they have put on evidence that some of these costs are variable and some of these costs are fixed.
>
> THE COURT: You have got him knocked now. You have knocked it all the way down. I have said it, he agreed with me. It is the Judge asking the question. I have established your case. They are selling below cost. You can call it variable, direct, whatever, you know.

With the Trial Court being of this frame of mind, it is not surprising that it was somewhat unconcerned about Plaintiffs' request to compel Defendant to comply with Rule 1006 of the Federal Rules of Evidence and produce records supporting its summary of variable costs.

The district Court's instruction on pricing fit squarely with the testimony of Plaintiffs' expert, who testified to the overall implications of ruinous competition, rather than limiting his analysis to a sterile variable cost approach based upon records previously represented to be non-existent and, as a matter of fact, never shown to exist.[1]

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[1] It was only after trial commenced that Agency took the position that it had records from which cost analysis could be done. Up to that time Agency steadfastly maintained that it could neither admit nor deny that it was losing money because it was not possessed of "knowledge or information" from which to make a determination. Logically this included records from which the determination could be made.

Prior to the foregoing colloquy, the testimony of Agency's expert had been devastated by the admission of Agency's Vice President of Finance that the summaries on which the expert relied did not include all costs, many of which could legitimately have been classified as variable.

Assuming, *arguendo,* that the record is insufficient to support a jury verdict, it is respectfully submitted that *American Excelsior* and *Malcolm* were so misleading in their language that to deny Plaintiffs a new trial is to deny them due process, trial by jury and substantial justice.

The opinion in this case seems to contain an internal conflict in that it states in footnote 6 that whether costs are variable or fixed "is one of the facts to be resolved by the jury," but does not give the jury the opportunity to do so, even though it recognizes that there was a substantial dispute with respect to which costs were fixed and which were variable. (12a, 17a).

Since the jury was never given the opportunity to decide which costs were fixed and which were variable, the Court of Appeals should have been limited to determining whether there was room for disagreement in the minds of reasonable men. In footnote 6 the Court of Appeals seems to recognize that it is well within the capabilities of juries to decide which costs are fixed and which are variable, given the appropriate legal instructions. It would seem to follow then that the Court of Appeals would be precluded from doing anything other than remanding the matter for trial by jury.

The Court of Appeals statement at 17a that "the record is devoid of any positive evidence that Agency's average variable cost ever exceeded its prices" is unequivocally wrong.

The pertinent facts which were before the jury, had a cost based instruction been given, are set forth hereafter.

The prices at which Agency rented cars is as follows:

Time	Price/Day
Nov. - February 1975-76	$7.00
March - April 1976	7.50
May - June 1976	8.00

Whether the lease cost of automobiles to Agency was variable or fixed was disputed.

The common circumstances where below cost pricing is expected is that of excess capacity. *Pac. Eng. & Prod. Co. of Nev.* v. *Kerr McGee Corp.*, 551 F.2d 790, 797 (10th Cir. 1977). There was not a condition of excess capacity in this case. Agency more than doubled its plant in order to supply the demand for the $7.00 car. When Agency did this, excess capacity was created until Agency drove Adjusters out of San Antonio and Adjusters and Wakely out of Austin.

As was stated by Areeda and Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act,* 88 Harv. L. Rev. 697 (1975) at 701:

> . . . Virtually all costs are variable when a firm, operating at capacity, plans to double its output by constructing new plants and purchasing new equipment.

In light of the way the number of cars in Agency's fleet fluctuated, the jury certainly could conclude that automobile costs were a variable cost. To illustrate, in San Antonio the fleet varied as follows:

CARS IN AGENCY'S SAN ANTONIO FLEET

	1975	1976
January	12	60
February	21	53
March	25	57
April	34	63
May	32	68
June	30	65
July	30	66
August	27	61
September	28	60
October	28	61
November	47	57
December	64	41[2]

Agency's vice president of finance testified that Agency's lease cost of cars was $149.93 per month.

With this foundation, which is fully supported by the record, the following variable costs are disclosed by the record:

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[2] In December, 1976, Agency opened a second office in San Antonio. This number reflects only one office.

SELECTED VARIABLE COSTS PER RENTAL DAY

Date	Auto [3]	Employee [4]	Delivery [5]	Total	Price/ Rental Day
1975					
Nov.	5.55	2.85	–0–	8.40	7.00
Dec.	5.55	1.23	–0–	6.78	7.00
1976					
Jan.	5.55	1.42	–0–	6.97	7.00
Feb.	5.55	1.95	–0–	7.50	7.00
Mar.	5.55	1.59	1.00	8.14	7.50
Apr.	5.55	1.28	1.00	7.83	7.50
May	5.55	1.09	1.00	7.64	8.00
June	5.55	1.19	1.00	7.74	8.00

[3] The auto cost per rental day is computed by taking the monthly lease cost of $149.93 and dividing by the number of rental days in a month giving Agency credit for a 90% utilization rate. The formula is $149.93 divided by 30 days X 90% i.e. $149.93 divided by 27 = $5.55.

[4] The employee cost per rental day is computed by dividing the monthly salary of the extra employee by the number of rental days attributable to cars exceeding 34. This number of cars is used because the office handled as many as 34 cars without the new employee. This new employee was hired to handle the increased volume expected to result from the $7.00 rate. An illustration of the computation using December, 1975, as an example is as follows: $1,000 divided by [43-34 cars X (30 days X 90% utilization)] i.e. $1,000 divided by (13 X 27 = 351) $2.85.

[5] Agency's Vice President of Finance testified that the cost of delivering a vehicle was $1.00 per day and that it incurred that cost at all prices except $7.00.

Expenses admitted to have been omitted from those evaluated by Agency's expert were the following:

(1) automobile license;

(2) insurance (cost of self-insurance);

(3) business forms;

(4) repairs;

(5) maintenance;

(6) advertising;

(7) hospitalization insurance for extra employee;

(8) payroll taxes for extra employee;

(9) postage; and

(10) bad debts.

Though Agency did not disclose the amounts of any of the foregoing, it did admit they were incurred. According to Areeda & Turner, *Id.* 700, all of the foregoing are variable costs.

The jurors, from their common sense and general experience, certainly would have been able to conclude that the additional variable costs, admittedly incurred, although the amounts were professed to be unknown, far exceeded the 22 cent, 3 cent, 36 cent and 26 cent differential in December, 1975, January, May and June, 1976.

The jury was not bound to accept the opinion of the expert witness who testified for Agency,[6] but rather had a right to use its own collective common

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[6] Particularly since he admitted that if the information given him was incorrect, his opinions were incorrect.

sense and experience and to draw all reasonable inferences from the facts and occurrences. *Franks* v. *National Dairy Products Corp.*, 414 F.2d 682, 685 (5th Cir. 1969). *Seaboard Surety Company* v. *First National Bank of Montgomery*, 263 F.2d 868, 871 (5th Cir. 1959). The jury is authorized to make reasonable inferences even if some speculation and conjecture is required. *Jenkins* v. *General Motors Corp.*, 446 F.2d 377, 380 (5th Cir. 1971). Even if expert testimony is uncontradicted, the jury may exercise its independent judgment. *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 627, 628, 64 S.Ct. 724, 729 (1944).

It is generally recognized that the jury is not bound by expert testimony and may substitute its own common sense judgment for that of experts. *Webster* v. *Offshore Food Service, Inc.*, 434 F.2d 1191, 1193 (5th Cir. 1970). Jurors have a right to reach a conclusion based on their own knowledge, experience and judgment which is contrary to the expert testimony. *Compton* v. *United States*, 377 F.2d 408, 412 (8th Cir. 1967).

As the Court of Appeals notes at footnote 6 "it will be obvious to judges and juries which costs are appropriately viewed as fixed and which are variable over the relevant time period".

Unless Plaintiffs are given a new trial, they will have been denied due process and a jury trial on the issues. The Supreme Court in *Neely* v. *Martin K. Ely Construction Co.*, 386 U.S. 317, 87 S.Ct. 1072 (1967) expresses substantial concern that Rule 50 F.R.C.P. be used to insure justice, not deny it. To deny Plaintiffs a new trial, if they are denied their

verdict, under the circumstances of this case, is to deny them justice.

II.

Low Barriers To Market Entry Do Not Preclude A Finding Of Attempt To Monopolize

The Court's conclusion at 18a, 19a, 20a that the absence of high barriers to entry also dooms the jury's conclusion that there was a dangerous probability of success is contrary to the law in the Fifth Circuit as well as others.

The most recent pronouncement by the Fifth Circuit is *Multiflex, Inc.* v. *Samuel Moore & Co.*, 709 F.2d 980, 994 (5th Cir. 1983), where it is stated:

> Attempted monopolization, on the other hand, does not invariably lead to the types of injury the antitrust laws seek to prevent. The attempt may fail to produce any actual antitrust injury to the market place.
>
> . . . The offense of attempted monopolization need not cause actual market damage, but need merely threaten to produce the type of market damage contemplated in the antitrust laws. The relevant test is whether the "dangerous probability of success," *if it had materialized,* would have caused the type of market damage the antitrust laws seek to prevent. The mere attempt is the offense.

In *Multiflex, Inc.* the "threatened injury to free and open competition never materialized except at most for a brief period." In fact, the plaintiff there grew from no share of market to in excess of a 60%

share while the defendant declined from a 100% share to 38%. Despite this the defendant was found liable to plaintiff for damage resulting from the attempt.

CONCLUSION

This case presents an important Constitutional issue which must be addressed lest the opinion of the Court of Appeals be interpreted to allow judges to decide controverted fact issues where a jury has been demanded.

To deny Plaintiffs a new trial under these circumstances is to deny them due process.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

July 9, 1984.

No. 83-1074.

ADJUSTERS REPLACE-A-CAR, INC.,
Plaintiff-Appellant Cross-Appellee,

v.

AGENCY RENT-A-CAR., INC.,
Defendant-Appellee Cross-Appellant.

WAKELY & ASSOCIATES, INC.,
Plaintiff-Appellant Cross-Appellee,

v.

AGENCY RENT-A-CAR, INC.,
Defendant-Appellee Cross-Appellant.

In a private antitrust suit, the United States District Court for the Western District of Texas at San Antonio, Fred Shannon, J., granted judgment n.o.v. to defendant. On appeal and cross appeal, the Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) plaintiffs failed to establish that any injury caused their businesses as result of defendant's participation in the insurance replacement car rental market stemmed from anticompetitive conduct within the second section of the Sherman Act; (2) predatory pricing was not shown in San Antonio and Austin; (3) anticompetitive hiring practices were not shown in Corpus Christi; and (4) plaintiffs failed to establish dangerous probability that defendant could have come to monopolize any of the markets.

Affirmed.

McFarland & Tondre, Brice A. Tondre, Houston, Tex., Robert R. Biechlin, Jr., San Antonio, Tex., for plaintiffs-appellants cross-appellees.

Cox, Smith, Smith, Hale & Guenther, Inc., Terry S. Bickerton, Deborah D. Williamson, Alan Michael Ferrill, San Antonio, Tex., William R. Pakalka, Houston, Tex., for defendant-appellee cross-appellant.

Appeals from the United States District Court for the Western District of Texas.

Before JOHNSON, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

We review the granting of judgment n.o.v. to the defendant in this private antitrust suit brought by Adjusters Replace-A-Car and Wakely & Associates, two insurance replacement car rental firms, against their rival, Agency Rent-A-Car, Inc. The principal accusation is that Agency employed predatory pricing in the San Antonio and Austin markets as part of an attempt to monopolize in violation of section two of the Sherman Act. Adjusters also charges that Agency hired away an essential employee in an attempt to monopolize the Corpus Christi market. Because we agree with the district court that plaintiffs failed to present a jury question regarding any of these claims, we affirm the judgment for Agency.

I

Adjusters, Wakely, and Agency all operated in a segment of the rental car business, providing replacement cars to persons whose cars had been stolen or damaged in an accident. The replacement rental firm deals directly with insurance adjusters, and is able to offer a lower rate than the standard public rental firms because its rentals are often long-term and its operating and advertising costs are

less. To the extent that firms specializing in insurance replacement rentals cannot satisfy the demand for such services, the public rental firms will also provide this service, though ordinarily at a higher cost to the insurer. The record indicates that a public rental firm wishing to compete directly in the insurance replacement segment of the market would be able to do so with relative ease.

In September 1973, Adjusters became the first insurance replacement rental firm to enter the San Antonio market. Wakely and Agency entered that market in October 1974, each charging a daily rental of $9.50; Adjusters' rate was then $8.50. Dissatisfied with its unprofitably small portion of the insurance replacement rental market in San Antonio, Agency cut its rental rate there to $8.00 per day in March 1975. When this tactic failed to increase its market share significantly, Agency in November 1975 reduced its rental rate to $7.00 per day.

At $7.00, Agency began to make substantial inroads into the San Antonio market. After four months it began increasing its price, first to $7.50, then to $8.00, and by July 1976 to $8.50. Agency admits that in San Antonio it suffered a net operating loss during the sixteen month period that its rental rate was set at $8.00 and below, and Adjusters and Wakely charge that Agency continued losing money until it raised its rental rate to $9.50 in February 1977.

In the Austin market, which Adjusters entered in December 1974 and Agency entered in November 1975, the $7.00 rental rate again proved a powerful tool with which Agency carved out a substantial share of the market. Agency's pricing in Austin evidently paralleled its pricing in San Antonio, and it again appears that Agency suffered net operating losses while offering the cheaper rate.

In December 1977, Adjusters left the Austin market and was replaced by Wakely, which charged first $10.00 and

then $11.00; Agency was apparently charging $10.45 when Wakely entered that market. Agency cut its Austin rental rate to $9.00 in January 1979. Wakely initially responded with an $8.50 rate, but closed its Austin office after April 1979.

Adjusters opened its Corpus Christi office in January 1975, and held the great percentage of that market by the time Agency opened there in May 1976. Agency came to prominence, however, after it hired away Adjusters' office manager, Patty Manges, who brought many of Adjusters' clients with her to Agency. So successful was Agency that Adjusters left Corpus Christi by March 1977.

Adjusters went out of business in March 1978, closing its San Antonio office. Adjusters' Dallas office, not involved in this litigation, had closed in July 1977. Wakely continues to operate in San Antonio. Both companies argue that their business reversals were due to anticompetitive conduct by Agency, which was allegedly attempting to monopolize the insurance replacement rental market in San Antonio, Austin, and Corpus Christi.

II

Section 2 of the Sherman Act, 15 U.S.C. § 2, makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states." A party injured by such anticompetitive conduct may sue to recover treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15. Here the claim is one of attempted monopolization by Agency, and the burden on the plaintiffs is to prove the elements of this offense and a causal relationship between the Agency's anticompetitive conduct and the plaintiffs' proven damages. *J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 704 F.2d 787, 795 (5th Cir. 1983).

The elements of an attempted monopolization under § 2 of the Sherman Act are: "(1) specific intent to accomplish the illegal result; and (2) a dangerous probability that the attempt will be successful." *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 276 (5th Cir. 1978), *cert. denied*, 440 U.S. 939, 99 S.Ct. 1289, 59 L.Ed.2d 499 (1979). The intent must be to do more than compete vigorously; vigorous competition is precisely what the antitrust laws are designed to foster. Thus, "[a] statement of intent to compete . . . even if perceived as a threat is not unlawful. Such a manifestation of intent to triumph in the competitive market, in the absence of unfair, anticompetitive or predatory conduct, is not enough to establish an antitrust violation." *Hayes v. Solomon*, 597 F.2d 958, 977 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078, 100 S.Ct. 1028, 62 L.Ed. 2d 761 (1980). Rather, the forbidden specific intent is that of acquiring and exercising "the power to fix prices or to exclude competition." *United States v. du Pont & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 1005, 100 L.Ed. 1264 (1956); *American Tobacco Co. v. United States*, 328 U.S. 781, 811, 66 S.Ct. 1125, 1140, 90 L.Ed. 1575 (1946); *Spectrofuge*, 575 F.2d at 276.

Adjusters and Wakely argue that the jury was entitled to infer that Agency had the requisite intent and was dangerously likely to succeed at monopolizing the insurance rental market in the relevant geographical area from evidince that Agency's pricing and operational strategies drove competitors from the marketplace when market conditions prevented other firms from entering the market to compete with Agency. The specific conduct which plaintiffs allege was anticompetitive is Agency's use of a predatory pricing regimen in San Antonio and Austin, and Agency's deliberate efforts to "steal" Adjusters' Corpus Christi customers by hiring away Adjusters' office manager in that city. Adjusters and Wakely claim that this anticompetitive conduct caused them injury in their trade or business.

Responding to interrogatories, the jury found that Agency had attempted to monopolize the insurance replacement car market in San Antonio and Austin by means of its pricing in 1975 and 1976, in Austin by means of its pricing in 1978 and 1979, and in Corpus Christi by means of hiring Patricia Manges. Total damages, without trebling, were set at $800,000.[1]

Defendants moved for judgment notwithstanding the verdict, and filed a brief supporting the motion. On this basis, the trial judge granted a judgment n.o.v. and dismissed the case.[2] Adjusters and Wakely appeal.[3]

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[1] The damage award was broken down as follows:

San Antonio	
Adjusters:	$271,000
Wakely:	88,000
Austin	
Adjusters:	182,000
Wakely:	162,000
Corpus Christi	
Adjusters:	97,000

[2] The court's order reads: "Having considered Defendant's Motion for Judgment Notwithstanding the Verdict, Plaintiffs' response thereto and the argument of counsel, as well as the evidence presented at trial hereof, the Court finds that said motion should be granted for the reasons set forth in Defendant's brief in support thereof."

We have many times disapproved the use of such brief, unilluminating orders granting judgment in complex cases. Most recently, in *Myers v. Gulf Oil Corp.*, 731 F.2d 281, 283 (5th Cir. 1984), we described an order almost identical to this one as being "pithy to the point of being incomplete," and we vacated a summary judgment so that the district judge could provide us with an adequate statement of reasons for his action. Such a statement by the trial court is essential to effective review. *Id.* at 284; *Jot-*

III

There is obviously a tension inherent in the legal assignment to protect competition but not competitors. Fighting hard but fair, avoiding ruinous competition and avoiding

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Em-Down Store (JEDS) Inc. v. Cotter & Co., 651 F.2d 245, 247 (5th Cir. 1981).

Here, though practical concerns persuade us to review and decide this case, we are left guessing about the district court's reason for granting judgment n.o.v. Did the district court conclude that plaintiffs failed to prove *prima facie* unlawful pricing? that they failed to prove dangerous likelihood of success? that they failed to prove fact of injury, or amount of damages, or causation? Perhaps Agency prevailed on all these issues; because the district court has said only that it adopts the arguments in Agency's post-verdict brief, we are effectively forced to assume that such is the case.

We are, of course, sympathetic to the trial court's limited resources—especially time—in the face of a heavy caseload. A lengthy opinion is not always required, and arguments may be incorporated from the parties' briefs if they are specifically recited rather than adopted *en masse*. In the final analysis, however, it is the trial court's exercise of judgment that we review, and in a case such as this one we must see more evidence of that judgment than a boilerplate order if we in turn are to perform our function effectively.

[3] In their initial appellate brief, plaintiffs argued that Agency's motion for judgment n.o.v. should not have been entertained by the trial judge because Agency allegedly did not make an adequate motion for directed verdict at the close of all the evidence as prescribed by Fed.R.Civ.P. 50(b). Agency, moved for directed verdict at the close of the plaintiff's evidence, laying out the various grounds on which it thought it was then entitled to judgment. At the close of the defendant's case, Agency briefly reurged its motion for directed verdict, incorporating the grounds urged in its initial motion.

Since plaintiffs' original brief was filed, this court has decided two cases involving similar contentions about allegedly insufficient

predation are often-used catchwords that fail in their central normative purpose—they do not segregate desired and undesired conduct in the marketplace. As a seeming precursor to the current willingness of courts to be informed by economics, Professors Areeda and Turner, lawyer and economist, undertook to suggest measures with content. Their effort was sufficiently successful that the starting point for an analysis of a predatory pricing claim is now their influential article, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act,* 88 Harv.L.Rev. 697 (1975), in which they analyze a firm's pricing in terms of that firm's average total cost, average variable cost, and marginal cost of production.

Basic economic theory subscribed to by Areeda and Turner teaches that in a perfectly competitive market a small manufacturer's price is dictated by the marketplace, and his production will be at the level where the marginal cost of producing another unit of output exactly equals the price that he will receive for this unit. A manufacturer's costs are divided between fixed costs, which do not vary with the level of production and cannot be avoided even if production shrinks to zero, and variable costs, which do vary with production and roughly equal the cost of the resources necessary to produce additional units of output. Because marginal cost is an economic concept with no exact

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motions for directed verdicts. *Bohrer v. Hanes Corp.*, 715 F.2d 213 (5th Cir. 1983), *cert. denied,* —— U.S. ——, 104 S.Ct. 1284, 79 L.Ed.2d 687 (1984); *Elliott v. Group Medical & Surgical Service,* 714 F.2d 556 (5th Cir. 1983). In both cases we rejected a rigid application of Rule 50(b), holding that if the court and counsel were adequately informed of the defendant's challenge to the sufficiency of plaintiff's evidence a motion for judgment n.o.v. could thereafter be entertained. *Bohrer* and *Elliott* control this case; the trial judge properly considered Agency's motion for judgment n.o.v.

counterpart in accounting, Areeda and Turner employ average variable cost as a surrogate for marginal cost.[4]

According to Areeda and Turner, a firm is always acting reasonably if it charges a price for its output that enables it to recover at least its average variable costs, because at that price the company is recovering the costs associated with producing each individual unit of output. The firm will, of course, prefer to recover its average total cost, but if it is unable to do so it will minimize its losses if it produces those units of output for which it can recover at least its variable costs. This is so because, in the short run at least, a firm cannot escape paying its fixed costs even if it reduces its production to zero.

Areeda and Turner argue that predatory pricing occurs only when a firm sets its price at a level below its average variable cost. At this price, the firm is suffering a loss on every unit of output it produces and sells, and its behavior is rational only if it hopes by engaging in this conduct to drive its competitors from the market and thereby gain monopoly powers that will enable it to charge a monopoly price in the future. This sort of pricing conduct is economically undersirable because the monopoly profits garnered by the monopolist over the long term will more than offset the short term benefit to consumers of the low predatory price. Competitors, of course, are harmed also, either by being driven from the market or by being disciplined into following the price leadership of the monopolist.

In this court's first major statement on predatory pricing following publication of the Areeda-Turner article, we adopted much of its analysis. *International Air Industries,*

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[4] Although variable costs and marginal costs will differ at some points along the production possibilities curve, we note simply that, so long as marginal cost did not significantly exceed average variable cost during the relevant time, any difference is not germane to our analysis.

Inc. v. American Excelsior Co., 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943, 96 S.Ct. 1411, 47 L.Ed.2d 349 (1976). We defined "predatory" to mean that the defendant "must have at least sacrificed present revenues for the purpose of driving [plaintiff] out of the market with the hope of recouping the losses through subsequent higher prices." *Id.* at 723. We agreed with Areeda and Turner that "a price above average cost is a fairly competitive price for it is profitable to the monopolist if not to its rivals; in effect, the price excludes only less efficient firms." *Id.* By contrast, "a firm's pricing behavior can be considered anticompetitive when it sells at a price below its average variable cost." *Id.* at 724.

One important exception to the principle that a price above average variable cost is presumed lawful occurs when there are substantial barriers to new entry into the relevant market. In such a case, we expressed concern that even a price above average variable cost might enable a monopolist to drive an existing competitor out of the market, whereafter the entry barriers would enable the monopolist to realize substantial monopoly profits. As the barriers to entry increase, so does the degree to which the monopolist's price may exceed his average variable cost and yet still be deemed predatory. *Id.* at 724-25 & n. 31. In sum:

> [I]n order to prevail as a matter of law, a plaintiff must at least show that either (1) a competitor is charging a price below his average variable cost in the competitive market or (2) the competitor is charging a price below its short-run, profit-maximizing price and barriers to entry are great enough to enable the discriminator to reap the benefits of predation before new entry is possible.

Id. at 724 (footnotes omitted). Finally, we cautioned that it is "important to look to the price discriminator's costs, rather than his competitor's cost, to determine whether the price discrimination was anti-competitive." *Id.* at 724-25.

The objective economic approach to predation that we adopted in *American Excelsior* is still the law of this circuit. At the same time, however, we declined to adopt Areeda and Turner's proposed *per se* test for predatory pricing whereby a price above average variable cost would be *per se* non-predatory and a price below average variable cost *per se* predatory. We were unwilling, in an attempted monopolization case, to relegate the intent element to the status of an automatic and irrebuttable inference.

That interest in the defendant's intent surfaced in *Malcolm v. Marathon Oil Co.*, 642 F.2d 845 (5th Cir.), *cert. denied*, 454 U.S. 1125, 102 S.Ct. 975, 71 L.Ed.2d 113 (1981), where we declared that "[p]redatory pricing differs from healthy competitive pricing in its motive: a predator by his pricing practices seeks 'to impose losses on other firms, not garner gains for itself.' " *Id.* at 853-54, *quoting* L. Sullivan, *Handbook of the Law of Antitrust* 111 (1977). While the *Malcolm* panel noted the ongoing debate between partisans of an economic test for predation—the Areeda-Turner approach—and partisans of an intent test—the Sullivan approach—and disclaimed any view of the merits of these alternative analytical frameworks, *id.* at 854 n. 17, this court had already joined the economic camp in *American Excelsior*, and that decision bound the panel deciding *Malcolm* as it binds this panel. *See White v. Estelle*, 720 F.2d 415, 417 (5th Cir. 1983).

Our latest statement on predatory pricing briefly iterates the teaching of *American Excelsior:*

> One seeking to establish predatory pricing must demonstrate that the defendant "at least sacrificed present revenues for the purpose of driving [the plaintiff] out of the market with the hope of recouping losses through subsequent higher prices." *International Air Industries v. American Excelsior Co.*, 517 F.2d 714, 723 (5th Cir. 1975), *cert. denied*, 424 U.S. 943, 96 S.Ct. 1411, 47 L.Ed.2d 349 (1976). Generally, in

> order to prove that the defendant has sacrificed present revenues, it is necessary to establish that the defendant's prices were below marginal or average variable cost.

Bayou Bottling, Inc. v. Dr Pepper Co., 725 F.2d 300, 305 (5th Cir. 1984).[5] In sum, although we follow with interest the continuing debate over theories of predation, the law in this circuit is that where barriers to entry are not pronounced predatory pricing is not established unless the defendant has set his price below his average variable cost.[6]

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[5] Sister circuits have also weighed the merits of Areeda and Turner's economic analysis of predation. Although all have accepted the basic premises of the Areeda and Turner formulation, most have expressed some reservations about supplanting entirely the intent-based test, and none have adopted a *per se* cost-based test. Of particular interest are the discussions in *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, —— U.S. ——, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982); and *Northeastern Tel. Co. v. American Tel. & Tel. Co.*, 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 455 U.S. 943, 102 S.Ct. 1483, 71 L.Ed.2d 654 (1982). A helpful overview of the caselaw in this area is Vawter & Zuch, *A Critical Analysis of Recent Federal Appellate Decisions on Predatory Pricing*, 51 Antitrust L.J. 401 (1983). A less comprehensive discussion of the caselaw accompanies an interesting and thought-provoking synopsis of the principal alternative theories of predatory pricing advanced in the legal and economic literature in Calvani & Lynch, *Predatory Pricing under the Robinson-Patman and Sherman Acts: An Introduction*, 51 Antitrust L.J. 375 (1983).

[6] We recognize that a cost which is regarded as fixed in the short-run may become variable in the long-run, as, for example, when durable goods wear out and are either replaced or not. In most cases, however, we think it will be obvious to judges and

IV

We review then the evidence to determine if it can sustain a finding that Agency charged a price below its average variable cost. If the evidence cannot support this finding, we must next determine if there is evidence that barriers to entry existed which could render even a price above average variable cost predatory. Related particularly to this latter inquiry, we must then query whether market conditions generated a dangerous probability that defendant would succeed in attaining a market position which would enable it to control the market price. We conclude as a matter of law that plaintiffs here failed on all three counts.

Before trial, plaintiffs filed requests for admissions under Fed.R.Civ.P. 36. The first request was: "During the period of time that Agency charged $7.00 per day for a rental unit in San Antonio, its San Antonio rental office experienced a net loss from operations." The second request substituted "Austin" for "San Antonio." The third request dealt with Agency's $8.00 price in San Antonio, and the fourth request dealt with Agency's $8.00 price in Austin. Agency admitted that all four propositions were true.

At trial, plaintiffs relied almost exclusively on these admissions as evidence that Agency had engaged in predatory pricing. Plaintiffs did not offer any evidence respecting Agency's variable and fixed costs of operation. Rather, plaintiffs interpreted Agency's admission that it had suffered "a net loss from operations" to be effectively an admission of predatory pricing. This was a costly error.

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juries which costs are appropriately viewed as fixed and which as variable over the relevant time period. When a legitimate dispute arises as to the characterization of certain costs, the question is one of fact to be resolved by the jury. *See William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d at 1036-38.

Plaintiffs fought admission of exhibits showing that Agency operations in San Antonio and Austin earned revenues greater than their costs during some of the months covered by the admissions and less than their costs during some others of these months. Plaintiffs argued that the exhibits conflicted with the admissions, but the exhibits were admitted when the trial judge concluded that the admissions related only to total costs and total revenues; when a portion of Agency's headquarters overhead was allocated to the individual offices, each showed a net loss throughout the period covered by the admissions. The defense exhibits, which made no provision for an allocation of centralized operating costs, were not inconsistent.

Admission of these exhibits afforded Agency an opportunity to demonstrate that the price it charged for a rental car never dropped below its average variable costs. Agency's expert testified, based on these documents, that Agency's average variable costs in San Antonio and Austin during the relevant time periods fluctuated between approximately $3.65 and approximately $5.00. Thus, Agency's price was always at least 40% greater than its average variable cost. The expert also testified that Agency's average variable costs in Austin were $5.23 when Agency went to a $9.00 price there in January 1979; the price was thus 72% above average variable cost. This testimony cut to the quick of plaintiffs' predatory pricing claim, and Adjusters and Wakely urge that admission of the defense exhibits upon which defendant's expert wholly relied was reversible error.

First, Adjusters and Wakely contend that the exhibits conflict with Agency's admissions that it operated at a net loss, but we reject this argument for the same reason as the trial judge: The admissions and the exhibits do not conflict. This is apparent when one has in mind what costs are reflected in each.

Second, plaintiffs charge that they were never given access to the underlying documents summarized in the profit and loss statements. The trial judge found, however, that plaintiffs bore most of the blame if they were surprised by the testimony of Agency's expert, for they had turned down an opportunity to take his deposition before trial. The underlying documents were in fact made available to plaintiffs, and they would have known which ones were important to their case if they had taken the deposition of Agency's expert. Plaintiffs, however, erroneously assumed that Agency's admissions gave them all the ammunition they needed, and were surprised to discover at trial that their big gun was not loaded.

Plaintiffs cry foul. Agency, they charge, took advantage of their misapprehension concerning the importance of the admissions. Even assuming this to be true,[7] nothing in our

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[7] The record does suggest that Agency did not share plaintiffs' misapprehension:

> THE COURT: * * * Mr. Tondre [plaintiffs' counsel] says they relied on these admissions and even after this [defense] expert was tendered, I mean, the expert negated the admissions at least insofar as certain months were concerned. He came up and said the average variable cost was exceeded by these prices.
>
> MR. BICKERTON [defendant's counsel]: Which was never any response—there was never any interrogatory. They have never asked us about costs, *your* Honor. I think that is the point in this case, and if you look at American Excelsior, it is not whether you make a profit or loss. It is the cost. Cost is the test in a predatory price increase [*sic*] case.

Agency made the same point in another exchange:

> MR. BICKERTON: We are not changing the admission.
>
> THE COURT: You are modifying it or explaining it, right? You are saying it ain't so.
>
> MR. BICKERTON: We are saying we agree that we lost money—you know, frankly, he didn't couch the question

adversary system prevents Agency from exploiting plaintiffs' error by watching silently as plaintiffs failed to carry their burden of proof. Agency was under no obligation to teach Adjusters and Wakely about the rudiments of predatory pricing or to point out the difference between a net operating loss and a price below average variable cost. Instead, this distinction was brought out at trial to rebut any impression that plaintiffs had established a prima facie case of predatory pricing.[6]

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properly: Did you have a net loss? Net loss is not even a relevant issue in a predatory pricing case. Below cost or above cost, that is the issue . . . .

[6] Thus, the following exchange occurred on direct examination of Agency's expert:

Q. Can a firm charge a price still above its average variable cost and still sustain a net loss in the period that you mentioned?

A. Can a firm charge a price above the average variable price [*sic*] and yet still maintain a net loss?

Q. For the period?

A. Yes.

Q. Is it true, then, that the term "average variable cost" and whether you are above or below average variable cost doesn't necessarily have anything to do with whether or not you are making a net profit or loss?

A. I would expect that if you are above average variable cost but below average total cost, you might be sustaining a loss.

Q. Talking about different concepts?

A. That's right.

Earlier in the trial Agency's chairman had also revealed a businessman's instinctive grasp of this concept:

Q. Pursuant to court procedures, pursuant to what is called a request for admissions, [Agency] has admitted that during the time Agency was charging $7.00 to $8.00 in San Antonio

Adjusters and Wakely seek now to convince us that Agency's price was below its average variable costs when it charged a $7.00 and $8.00 rental rate for its automobiles. Such evidence, however, had to be set before the jury, and the record shows that plaintiffs failed to carry their burden even of proving a prima facie case of below-cost pricing. Although plaintiffs challenged many of the assumptions shaping the opinion of Agency's expert, the record is devoid of any positive evidence that Agency's average variable cost ever exceeded its prices. Judgment n.o.v. is appropriate when "there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question." *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc). This record will not support a finding that Agency's price was ever inadequate to cover its average variable costs.[9]

Under the *American Excelsior* rule, plaintiffs might still prevail if they were able to establish that the barriers to entry were sufficiently high to render even a price above average variable cost predatory. The insurance replacement car market is neither a natural monopoly nor a heavily regulated industry. Plaintiffs argue, however, that barriers existed in the form of high start-up costs and the need for contacts within the insurance industry. We find that the only conclusion permitted by the record is that the barriers to entry into this market were slight—not negligible, perhaps, but assuredly not so great as to permit

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and Austin, it was losing money in those offices. That is the state of the record.

A. Sir, we could be charging $50 per car when we first open and still lose money.

[9] Nor, given the essentially fungible character of the product and the relatively low plant investment, is it surprising that there is no suggestion that marginal cost ever exceeded average variable cost.

a monopoly born of predatory pricing to be exploited before new competition would scotch the potential for extra-normal profits.[10]

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[10] Sensitive to the stricture that when a judgment n.o.v. is sought the evidence must be viewed "in the light and with all reasonable inferences most favorable to the party opposed to the motion," *Boeing Co. v. Shipman*, 411 F.2d at 374, we set out some of the exchanges at trial that underlie our conclusion. Most direct was the testimony of Agency's expert:

> Q. [D]o you have an opinion as to whether or not any company could have charged a monopoly [price] in the replacement car rental business?
>
> • • • • • •
>
> A. In my opinion no company could have established a monopoly in San Antonio in the auto replacement rental business at that time.
>
> Q. Why is that?
>
> A. Primarily, there are no barriers to entry. Should a company be able to, even for a short period of time, exclude competition and raise their prices to an unusual profit, the market would be flooded by competitors to compete away any monopoly profits. There are so low barriers to entry into the business from what I can learn that there could be no monopoly in that industry.

A jury question would have been presented, of course, if plaintiffs' evidence had been to the contrary. Instead, plaintiffs' expert effectively endorsed the defense expert's assessment:

> Q. Do you remember we had some discussion about replacement[?] Didn't you tell me in the deposition it was your perception that it would be easy for the daily car companies, the Hertz and Avises to get into the business whether or not they are in it at this time? You said that?
>
> A. I think it would be easy for me to get in it. I guess it obviously would be easy for them.
>
> Q. I think you also indicated it would be easy for the new car dealers to get into the business whether or not they were in it at this time?

This last conclusion dooms not only plaintiffs' claim of predatory pricing, but also another necessary element of

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A. That is correct.

Even more damaging to plaintiffs' case were the admissions made by the founder and president of Adjusters:

Q. Essentially, all it takes to be in the replacement car business or the insurance rental business is cars and an office and a decision to be involved in that business, isn't that true?

A. And some knowledge.

Q. Some knowledge. Wouldn't you assume that Hertz or Avis or any existing car rental company would have at least as much about the replacement car rental business as you did when you started the business?

A. Yes, but they would want to specialize.

Q. So, you would agree with me, then, would you not, that there is a possible ready transition by the Hertzes and the Avises into the insurance rental business even to a larger extent than they are now?

A. Yes.

Q. And isn't there also another source of competition in the replacement car insurance rental business, that being the car dealers?

A. Some car dealers.

* * * * * *

Q. [I]f the new car dealers made the decision to get into the replacement car business in San Antonio, all it would take would be the decision to do it and acquiring the knowledge?

A. It is the same as in any business.

Q. Is there any reason to think they couldn't develop a fantastic business within a year just like you did?

A. No.

* * * * * *

Q. And we also know that regardless of how many actual competitiors there are for this business, there are a whole lot of potential competitors, isn't that true[?]

A. There is a lot of potential, yes.

their case—the dangerous probability of success. If the market structure will not allow a dominant firm to set its price above the competitive level, the strictures of the antitrust laws are not activated. The injury to plaintiffs' business is not cognizable under the antitrust laws if competition itself is not harmed. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-89, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962).

Only Adjusters, during its first year of operations, had the luxury of being the sole firm in San Antonio specializing in insurance replacement rentals. Significantly, Adjusters' founder testified that during this period he was able neither to set a monopolist's price nor to prevent competitors from entering the market.

On this record, the trial judge concluded that, as a matter of law, plaintiffs failed to establish that Agency engaged in anticompetitive conduct in San Antonio and Austin which created a dangerous probability that Agency would come to wield monopoly powers in those markets. We agree with this conclusion, and accordingly affirm the granting of judgment n.o.v. on these claims.

V

In Corpus Christi, Adjusters' complaint rests on the fact that Agency hired Adjusters' former office manager, Patty Manges, and that many of Adjusters' customers followed her to Agency. Adjusters charges that Manges was lured away from her job with that company, and that she was specifically induced to draw away Adjusters' customers.

The case principally relied upon by both parties is *Associated Radio Service Co. v. Page Airways, Inc.*, 624 F.2d 1342 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030, 101 S.Ct. 1740, 68 L.Ed.2d 226 (1981). *Page* must be read on its facts.

Within a narrowly framed market, we found an antitrust violation on the basis of evidence that the defendant had induced the plaintiff's employees to act disloyally in steering business toward the defendant while they were evidently still in the employ of the plaintiff. Here there was no evidence that Manges acted inimically to Adjusters' interests until she had already left their employ for Agency.

Page supports the view that "the mere hiring away of employees from a rival" is lawful. 624 F.2d at 1354. The fact that the employee then uses her own skills and contacts—and not, for example, misappropriated trade secrets—to generate business for her new employer, even at the expense of her old employer, provides no basis for antitrust liability. The record here contained nothing more, and we hold accordingly that judgment n.o.v. was properly granted to Agency on this claim.

VI

In sum, plaintiffs have failed to establish that any injury caused their businesses as a result of Agency's participation in the insurance replacement car rental market in San Antonio, Austin, and Corpus Christi stemmed from anticompetitive conduct comprehended by section 2 of the Sherman Act. Predatory pricing was not shown in San Antonio and Austin; anticompetitive hiring practices were not shown in Corpus Christi. Plaintiffs likewise failed to establish a dangerous probability that Agency could have come to monopolize any of these markets. As the evidence was insufficient to support a jury verdict for the plaintiffs, entry of judgment n.o.v. was appropriate.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-1074

ADJUSTERS REPLACE-A-CAR, INC.,
Plaintiff-Appellant Cross-Appellee,

v.

AGENCY RENT-A-CAR., INC.,
Defendant-Appellee Cross-Appellant.

WAKELY & ASSOCIATES, INC.,
Plaintiff-Appellant Cross-Appellee,

v.

AGENCY RENT-A-CAR, INC.,
Defendant-Appellee Cross-Appellant.

Appeal from the United States District Court for the Western District of Texas

[U.S. Court of Appeals. Filed Aug. 20, 1984
Gilbert F. Ganucheau, Clerk]

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion July 9, 1984, 5 Cir., 198—, —— F.2d ——)
(August 20, 1984)

Before JOHNSON, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on

rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Patrick E. Higginbotham
United States Circuit Judge

Clerk's Note: See FRAP and local Rules 41 for stay of the mandate.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SA-78-CA-229
(Consolidated with
SA-79-CA-422)

ADJUSTERS REPLACE-A-CAR, INC.,

and

WAKELY RENT-A-CAR, INC.,

vs.

AGENCY RENT-A-CAR, INC.

ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

[Filed Jan. 18, 1983, Charles W. Vagner, Clerk]

Having considered Defendant's Motion for Judgment Notwithstanding the Verdict, Plaintiffs' response thereto and the argument of counsel, as well as the evidence presented at the trial hereof, the Court finds that said motion should be granted for the reasons set forth in Defendant's brief in support thereof.

It is, therefore, ORDERED, ADJUDGED and DECREED that Defendant's Motion for Judgment Notwithstanding the Verdict be, and the same is hereby in all things GRANTED, and this case is dismissed with prejudice at Plaintiffs' cost.

Signed this 18 day of January, 1983.

/s/ FRED SHANNON
Fred Shannon,
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No.
SA-78-CA-229

ADJUSTERS REPLACE-A-CAR, INC., *Plaintiff*,

vs.

AGENCY RENT-A-CAR, INC., *Defendant*.

JURY VERDICT FORM

[Filed Nov. 15, 1982, Charles W. Vagner, Clerk]

We, the Jury, have answered the attached questions as required by the instructions of the Court, and herewith return the same as our verdict.

/s/ PATSY GRANATO
(Foreman)

November 15, 1982

QUESTION NO. 1

Do you find from a preponderance of the evidence that Defendant attempted to monopolize the insurance replacement car market in any of the following areas in the stated time periods by its pricing?

"Attempt to Monopolize" means that one has taken action specifically intended to injure or destroy competition so that one may thereafter control prices or exclude the future entry of competitors into the market.

You may find an attempt to monopolize even though the conduct in question was not successful in causing monopolization. However, you may not find an attempt to monopolize unless you find from a preponderance of the evidence that the conduct in question produced a dangerous probability of successful monopolization.

Prices in a particular market area which are equal to or above all costs allocable to that area cannot be considered an attempt to monopolize.

Below cost pricing is not an attempt to monopolize, unless it is motivated by a specific intent to monopolize, and has a dangerous probability of success.

Answer "We Do" or "We Do Not" as to each of the following:

A. 1975 & 1976

i.) San Antonio: We Do.

ii.) Austin: We Do.

B. 1978 & 1979

i.) Austin: We Do.

QUESTION NO. 2

Do you find from a preponderance of the evidence that Defendant attempted to monopolize the Corpus Christi insurance replacement car market in 1976 by hiring Patricia Manges?

You may refer to the definition of "attempt to monopolize" given in the first two paragraphs after Question No. 1

Answer "We Do" or "We Do Not".
We, the Jury, answer: We Do.

If you have answered any part of Question No. 1 "We Do", or "We Do" to Question No. 2, then answer the corresponding part of Question No. 3; otherwise do not answer any part of Question No. 3.

QUESTION NO. 3

What sum of money, if any, if paid now in cash do you find from a preponderance of the evidence would be fair and reasonable compensation for the loss of net profit, if any, which you find from a preponderance of the evidence was proximately caused by the conduct of Defendant inquired about in the foregoing questions?

"Proximate Cause" means that cause which in a natural and continuous sequence produces an event and without which such event would not have occurred; and in order to be a proximate cause the act or omission complained of must be such that a person using ordinary care would have foreseen that the event or some similar event might reasonably result therefrom. There may be more than one proximate cause of an event.

Answer in Dollars and Cents, if any.

1. A. (i) San Antonio

Adjusters: $271,000.00.

Wakely: $ 88,000.00.

1. A. (ii) Austin

Adjusters: $182,000.00.

1. B. (i) Austin

Wakely: $162,000.00.

2. Corpus Christi

Adjusters: $ 97,000.00.

Office - Supreme Court, U.S
FILED
DEC 24 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-793

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ADJUSTERS REPLACE-A-CAR, INC.,
AND WAKELY & ASSOCIATES, INC.,
Petitioners,

v.

AGENCY RENT-A-CAR, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

I. Whether the decision of the Court of Appeals denied Petitioners due process of law?

II. Whether the Court of Appeals correctly declined to permit Petitioners to adduce evidence on appeal that was not presented to the jury?

III. Whether the Court of Appeals' alternative holding that proof of low barriers to entry precluded a finding of dangerous probability of successful monopolization in this case presents an issue appropriate for certiorari?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 4

I. The Decision of the Court of Appeals Did Not Deny Petitioners Due Process Of Law 5

II. The Court of Appeals Correctly Declined Petitioners' Offer To Adduce Evidence On Appeal Not Presented To The Jury 10

III. The Court of Appeals' Conclusion Regarding the Absence of a Dangerous Probability of Success Does Not Present an Issue Appropriate For Certiorari 11

CONCLUSION 14

TABLE OF AUTHORITIES

CASES	Page
Americana Industries, Inc. v. Wometco de Puerto Rico, Inc., 556 F.2d 625 (1st Cir. 1977)	8
Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933)	9
Bayou Bottling, Inc. v. Dr Pepper Co., 725 F.2d 300 (5th Cir.), *cert. denied*, 105 S. Ct. 123 (1984)	6
Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980)	9
Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) *(en banc)*	7
Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d 427 (7th Cir. 1980)	7
Colten v. Kentucky, 407 U.S. 104 (1972)	9
Franklin v. First Money, Inc., 427 F. Supp. 66 (E.D. La. 1976), *aff'd*, 599 F.2d 615 (5th Cir. 1979)	8, 9
Hansen v. Shell Oil Co., 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977)	8
International Air Industries, Inc. v. American Excelsior Co., 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976)	4, 6, 12
Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978)	7

Table of Authorities Continued

CASES	Page
MCI Communications Corp. v. American Telephone & Telegraph Co., 708 F.2d 1081 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983)	7
Malcolm v. Marathon Oil Co., 642 F.2d 845 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981)	5, 6
Multiflex, Inc. v. Samuel Moore & Co., 709 F.2d 980 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 1594 (1984)	12
Northeastern Telephone Co. v. American Telephone and Telegraph Co., 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982)	7
O. Hommel Co. v. Ferro Corp., 659 F.2d 340 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982)	8
Pacific Engineering & Production Co. v. Kerr-McGee Corp., 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977)	7
Piccirillo v. New York, 400 U.S. 548 (1971)	13
SuperTurf, Inc. v. Monsanto Co., 660 F.2d 1275 (8th Cir. 1981)	8
United States v. American Airlines, Inc., 743 F.2d 1114 (5th Cir. 1984)	9
United States v. Johnston, 268 U.S. 220 (1925)	11
United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897)	9
United States v. United States Gypsum Co., 438 U.S. 422 (1978)	9

Table of Authorities Continued

Page

STATUTES AND RULES

U.S. CONST. amend. V 5, 8, 9

15 U.S.C. § 2 2

Rule 17, Rules of the Supreme Court 4, 5, 15

Rule 28.1, Rules of the Supreme Court 1

TREATISES AND LAW REVIEWS

II P. AREEDA & D. TURNER, ANTITRUST LAW (1978) 9

Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-793

ADJUSTERS REPLACE-A-CAR, INC.,
AND WAKELY & ASSOCIATES, INC.,
Petitioners,

v.

AGENCY RENT-A-CAR, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION

Respondent, Agency Rent-A-Car, Inc. ("Agency"),[1] respectfully requests the Court to deny the Petition for a Writ of Certiorari to review the Judgment entered in this case by the United States Court of Appeals for the Fifth Circuit on July 9, 1984.

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[1] In accordance with Rule 28.1 of the Rules of the Supreme Court, we note that Agency is not a subsidiary of any other entity.

STATEMENT OF THE CASE

This is a civil antitrust suit brought by Adjusters Replace-A-Car, Inc. ("Adjusters") and Wakely & Associates, Inc. ("Wakely"), against Agency, alleging attempted monopolization of the "replacement rental car" market[2] in violation of section 2 of the Sherman Act, 15 U.S.C. § 2.[3] Specifically, Petitioners allege that Agency engaged in predatory pricing in the San Antonio and Austin, Texas markets, and hired an employee of Adjusters' Corpus Christi, Texas outlet.

During the course of pre-trial discovery, Petitioners propounded four requests for admissions, wherein Petitioners requested Agency to admit that, during the times Agency rented automobiles for $7.00 and $8.00 per day, Agency's San Antonio and Austin offices sustained a "net loss from operations." Agency admitted all four propositions. Petitioners eschewed the opportunity to depose Agency's expert witness prior to trial, and likewise declined Agency's pre-trial offer to exchange the exhibits that the parties intended to offer into evidence (Pet. App. at 15a). Instead, as the Court of Appeals noted, Petitioners proceeded to trial solely on the admissions that Agency's San Antonio and Austin offices sustained a

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[2] As defined by Petitioners, this market includes firms that rent automobiles to replace temporarily a vehicle that is damaged or otherwise inoperable, but does not include major car rental companies, such as Avis and Hertz. Although Agency disputed Petitioners' definition of the market, it was accepted as a matter of law by the District Court.

[3] The procedural history and facts involved herein are set forth in the opinion of the Court of Appeals, appended to the Petition for a Writ of Certiorari ("Petition"). References herein to the Petition appear as (Pet. at _____), and to the opinion of the Court of Appeals as (Pet. App. at _____).

net loss during the relevant time periods.[4] As the Court of Appeals noted, "[t]his was a costly error" (Pet. App. at 13a).

At trial, Agency introduced evidence demonstrating that the prices of which Petitioners complained never dropped below Agency's average variable cost, and that, indeed, Agency's prices were always at least forty percent greater than its average variable cost. Both the District Court and the Court of Appeals concluded that the exhibits upon which the testimony of Agency's expert was based were not inconsistent with Agency's pre-trial admissions, because those admissions—which related only to a "net loss from operations"—pertained to average *total* cost, not average variable cost (Pet. App. at 14a).[5] As the Court of Appeals noted, Petitioners—who had conducted no discovery whatsoever with respect to Agency's costs—"erroneously assumed that Agency's admissions gave them all the ammunition they needed, and were surprised to discover at trial that their big gun was not loaded" (Pet. App. at 15a). The Court of Appeals rejected the suggestion that Petitioners had been "ambushed," noting that prior to trial Agency's

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[4] Inasmuch as Petitioners do not now complain of the ruling by the Court of Appeals with respect to the Corpus Christi, Texas market, we will not address that determination.

[5] The Court of Appeals also rejected Petitioners' suggestion that the exhibits, which showed that Agency's local revenues were greater in some months than local expenses, were inconsistent with the pre-trial admissions, because the exhibits excluded an allocation for the fixed cost of Agency's national corporate overhead (Pet. App. at 14a).

expert witness and exhibits had been offered to Petitioners, who declined both offers (Pet. App. at 15a).

As noted above, the District Court adopted, over Agency's objection, Petitioners' definition of the relevant product market as a matter of law. The District Court also denied Agency's motion for directed verdict and Agency's request to submit a special interrogatory on Agency's average variable cost, both of which were expressly based on the Fifth Circuit's prior decision in *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

Following the jury's verdict in favor of Petitioners, the District Court granted Agency's motion for judgment notwithstanding the verdict, and denied Agency's conditional motion for new trial, which was based in part on the District Court's denial of Agency's request to submit the issue of the relevant product market to the jury. On July 9, 1984, the Court of Appeals affirmed the Judgment of the District Court on the ground that, absent proof of high barriers to the entry of new firms, Petitioners' failure to adduce any evidence to suggest that Agency's prices ever fell below average variable cost foreclosed a finding of predation (Pet. App. at 17a-18a). The Court of Appeals denied Petitioners' petition for rehearing and suggestion for rehearing *en banc* on August 20, 1984.

REASONS FOR DENYING THE PETITION

Rule 17 of the Rules of the Supreme Court provides that a review on writ of certiorari "will be granted only when there are special and important reasons therefor." Having failed to adduce evidence to support their allega-

tions of predatory pricing, and in an effort to meet the requirements of Rule 17, Petitioners seek to characterize the Court of Appeals' decision as a violation of the right to due process of law under the Fifth Amendment to the Constitution of the United States. As demonstrated below, Petitioners' argument is as untenable as it sounds, because it is premised upon a mischaracterization of the Court of Appeals' decision and contrary to settled precedent.

I. THE DECISION OF THE COURT OF APPEALS DID NOT DENY PETITIONERS DUE PROCESS OF LAW

Although Petitioners' quarrel with the Court of Appeals' decision is, charitably, somewhat opaque, their principal argument appears to be that, at the time this case was tried, the law in the Fifth Circuit regarding predatory pricing was unclear, and that, in affirming the District Court's judgment n.o.v., the Court of Appeals followed legal principles that surprised Petitioners. Expanding on this argument, Petitioners claim that they were deprived of the right to trial by jury on the issue that the Court of Appeals held to be determinative, *i.e.*, whether Agency's prices were above or below average variable cost (Pet. at 6-10). Specifically, Petitioners profess astonishment with the Court of Appeals' determination that "the law in this circuit is that where barriers to entry are not pronounced predatory pricing is not established unless the defendant has set his price below his average variable cost" (Pet. App. at 12a; footnote omitted). Relying upon the Fifth Circuit's prior opinion in *Malcolm v. Marathon Oil Co.*, 642 F.2d 845 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981), wherein the Court ack-

nowledged in dicta[6] the ongoing debate between adherents of the Areeda-Turner average variable cost test for predation,[7] and critics of that view, Petitioners argue that, prior to the Court of Appeals' decision herein, the law in the Fifth Circuit regarding predatory pricing was "unclear."

The principal difficulty with Petitioners' argument is that it is flatly foreclosed by the opinion of the Court of Appeals. As the Fifth Circuit explained, its prior decision almost a decade ago in *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976), embraced the average variable cost test as the law of that Circuit:

> While the *Malcolm* panel noted the ongoing debate between partisans of an economic test for predation—the Areeda-Turner approach—and partisans of an intent test—the Sullivan approach—and disclaimed any view of the merits of these alternative analytical frameworks, this court had already joined the economic camp in *American Excelsior*, and that decision bound the panel deciding *Malcolm* as it binds this panel.

(Pet. App. at 11a) (citations omitted).[8]

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[6] The question of predatory pricing was not before the Court of Appeals in *Malcolm*, and the Court therein properly declined to offer any opinion on the relative merits of the competing theories. 642 F.2d at 854 n.17.

[7] *See* Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV 697 (1975).

[8] The Court of Appeals went on to note that the average variable cost test again was embraced by that Court in *Bayou Bottling, Inc. v. Dr Pepper Co.*, 725 F.2d 300 (5th Cir.), *cert. denied*, 105 S. Ct. 123 (1984) (Pet. App. at 11a-12a).

Simply stated, in light of the Court of Appeals' express recognition that its decision herein not only is in accord with, but indeed was mandated by, prior decisions of that Court, Petitioners' suggestion to the contrary is less than compelling. That Agency asserted the average variable cost test in its motion for summary judgment, motion for directed verdict, proposed jury instructions[9] and motion for judgment notwithstanding the verdict, as well as the overwhelming adoption by other Circuits of the average variable cost test as a *prima facie* test for predation,[10] further refute Petitioners' claim that they were not on notice of that test.

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[9] Petitioners' suggestion that they were denied the opportunity to have the jury decide the question whether Agency's prices were above or below average variable cost has a somewhat checkered history. Agency—not Petitioners—submitted a requested instruction on average variable cost. Petitioners, on the other hand, ardently insisted before the District Court that the average variable cost test should not be applied. Moreover, in affirming the District Court's judgment n.o.v., the Court of Appeals determined that Petitioners failed to raise a jury issue with respect to whether Agency's prices were above or below average variable cost. *See Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) *(en banc)*. At the risk of belaboring the obvious, an "issue" not raised by the evidence need not be submitted to the finder of fact.

[10] *See MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983); *Northeastern Telephone Co. v. American Telephone and Telegraph Co.*, 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427, 432 (7th Cir. 1980); *Janich Brothers, Inc. v. American Distilling Co.*, 570 F.2d 848, 858 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 797 (10th Cir.), *cert.*

(Footnote continued on next page)

Finally, it is worth noting that Petitioners have failed to identify any authority to support the notion, lurking behind their contentions, that the Due Process Clause of the Fifth Amendment serves to ensure that litigants are not surprised by judicial decisions. Indeed, any such principle of Constitutional law was unequivocally and properly rejected by Judge Rubin in *Franklin v. First Money, Inc.*, 427 F. Supp. 66 (E.D. La. 1976), *aff'd*, 599 F.2d 615 (5th Cir. 1979):

> The defendant contends the court's decision "startled" it. The decision was, it asserts, so unpredictable that a regulation permitting it to be reached is unconstitutional. But the fact that a decision interpreting a statute or regulation surprises the parties does not make the law unconstitutional. *The due process clause does not protect citizens against judicial decisions that they consider unforeseeable, nor does it assume that litigants will always receive judgments on their lawsuits that they can accept with equanimity.*

427 F. Supp. at 68 (emphasis added). Judge Rubin went on to note:

> A statute so vague as to have no predictable meaning is void for vagueness. But this doctrine does not ordain the unconstitutionality of a statute that two lawyers may read differently, nor does it mean that

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(Footnote 10 continued)

denied, 434 U.S. 879 (1977); *Hansen v. Shell Oil Co.*, 541 F.2d 1352, 1358 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); *Americana Industries, Inc. v. Wometco de Puerto Rico, Inc.*, 556 F.2d 625 (1st Cir. 1977); *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); *SuperTurf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1281 (8th Cir. 1981).

> persons subject to the law may bank against startling or inconsistent decisions. *The fundamental purpose of the doctrine is to prevent capricious and unforeseeable enforcement of the law, and to require its application in a fair and reasonable manner.*

427 F. Supp. at 69 (emphasis added), *citing Colten v. Kentucky*, 407 U.S. 104, 110 (1972).[11]

Petitioners, of course, do not expressly challenge the constitutionality of the Sherman Act, for that question was resolved over eighty years ago. *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897). Petitioners' attempt to achieve the same result through the pretext of arguing the "unpredictability" of the Court of Appeals' decision is not only counterfactual, but, under the foregoing principles, fails to raise a cognizable claim under the Due Process Clause. Thus, no issue appropriate for certiorari is presented.

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[11] Recently, the Fifth Circuit reaffirmed the principle that the drafters of the Sherman Act did not purport to obviate the necessity for judicial interpretations thereunder:

> We reject appellees' argument that because the courts previously have not been faced with a factual situation similar to the case at bar, that the conduct cannot violate the antitrust laws. By deliberately choosing not to delineate the myriad activities which would be forbidden by the Act, Congress left to the courts the task of determining whether given conduct constitutes an offense under the Sherman Act.

United States v. American Airlines, Inc., 743 F.2d 1114, 1122 n.14 (5th Cir. 1984), *citing, United States v. United States Gypsum Co.*, 438 U.S. 422, 474 n.14 (1978); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360 (1933); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 272 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); II P. AREEDA & D. TURNER, ANTITRUST LAW ¶1310 (1978).

II. THE COURT OF APPEALS CORRECTLY DECLINED PETITIONERS' OFFER TO ADDUCE EVIDENCE ON APPEAL NOT PRESENTED TO THE JURY

Petitioners' alternative argument is that the District Court and the Court of Appeals erred in determining that the record fails to demonstrate that Agency's prices were below average variable cost. As noted above, however, Petitioners proceeded to trial solely on the basis of Agency's admissions that the local Agency offices experienced a "net loss from operations" during the relevant time periods, and, in the Court of Appeals' words, "did not offer any evidence respecting Agency's variable and fixed costs of operation" (Pet. App. at 13a).[12]

In the Fifth Circuit, Petitioners attempted to argue that *had* certain costs been incurred by Agency's local offices, and *had* those costs not been included in the financial statements relied upon by Agency's expert, the

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[12] The Petition is laced with oblique references to the District Court's supposed refusal to permit Petitioners to attempt to rebut Agency's proof of above-average variable cost pricing, as well as the suggestion that Agency "admitted" that numerous cost items incurred by Agency's local offices were excluded from Agency's exhibits (Pet. at 7-10, 14). Neither proposition is supported by the record. As the Court of Appeals noted, "[t]he underlying documents were in fact made available to plaintiffs" (Pet. App. at 15a), and Agency's witnesses allowed only that *had* certain costs been incurred by the local offices, and *had* those costs not been considered when preparing Agency's exhibits, the conclusions drawn therefrom might have been different. The Court of Appeals correctly concluded that such unsupported assumptions could not substitute for positive evidence (Pet. App. at 17a).

local offices might have experienced losses during certain months. As the Court of Appeals noted:

> Such evidence, however, had to be set before the jury, and the record shows that plaintiffs failed to carry their burden even of proving a prima facie case of below-cost pricing. Although plaintiffs challenged many of the assumptions shaping the opinion of Agency's expert, the record is devoid of any positive evidence that Agency's average variable cost ever exceeded its prices.

(Pet. App. at 17a). The foregoing principles fully apply to Petitioners' attempt to induce this Court to perform the fact-finding function that the Court of Appeals properly declined.[13] As Mr. Justice Holmes stressed in *United States v. Johnston*, 268 U.S. 220, 227 (1925), "[w]e do not grant a certiorari to review evidence and discuss specific facts." Because Petitioners' request is properly so characterized, the Petition should be denied.

III. THE COURT OF APPEALS' CONCLUSION REGARDING THE ABSENCE OF A DANGEROUS PROBABILITY OF SUCCESS DOES NOT PRESENT AN ISSUE APPROPRIATE FOR CERTIORARI

As noted above, in affirming the Judgment of the District Court, the Court of Appeals held that, absent proof of high barriers to the entry of new firms, Petitioners' failure to present any evidence to the jury to suggest that Agency's prices ever fell below average variable cost precluded a finding of predatory pricing. In

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[13] The "evidence," assumptions and conclusions set forth in the Petition (Pet. at 12-13) are substantially the same as those proffered by Petitioners for the first time to the Court of Appeals.

addition, the Court of Appeals noted that the absence of high entry barriers "dooms not only plaintiffs' claim of predatory pricing, but also another necessary element of their case—the dangerous probability of success" (Pet. App. at 19a-20a). As the Court of Appeals explained, "[i]f the market structure will not allow a dominant firm to set its price above the competitive level, the strictures of the antitrust laws are not activated" (Pet. App. at 20a).

Again, Petitioners appear to avoid a direct challenge to the merits of the Court of Appeals' reasoning, choosing instead to argue that the Court's determination concerning the significance of entry barriers conflicts with that Court's prior decision in *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F. 2d 980 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 1594 (1984). This contention likewise misses the mark. Simply stated, nothing in *Multiflex* suggests—much less ensconces in *stare decisis*—a determination by the Fifth Circuit that the absence of entry barriers is irrelevant to attempted monopolization analysis. Rather, the Court in *Multiflex* simply reaffirmed the well-settled principle that the attempt offense under section 2 does not always require proof of actual injury to competition, but requires only that the conduct complained of present a dangerous probability of successful monopolization. 709 F.2d at 990-92. This, of course, is fully consistent with the determination below that conduct cannot present a dangerous probability of monopolization if, all things being equal, entry barriers are so low that supracompetitive prices would attract new entrants, thus driving the market price back to competitive levels (Pet. App. at 17a-18a). This precept likewise is fully in accord with *Excelsior*. *See* 517 F.2d at 724.

In any event, Petitioners' characterization of the deci-

sions below, even if accepted *arguendo*, leads nowhere. As noted above, Petitioners do not attempt to demonstrate that the Court of Appeals' determination concerning the significance of entry barriers was erroneous, but argue only that the Fifth Circuit's decision supposedly was contrary to a prior decision of *that* Court—arguably a matter for *en banc* rehearing before the Court of Appeals,[14] but hardly a matter appropriate for review on certiorari. More important, the Court of Appeals' discussion concerning entry barriers was at best an *alternative* holding to that Court's primary determination that Petitioners failed to raise an issue of predatory pricing. Accordingly, absent a determination that a *prima facie* case of predatory pricing in fact was adduced by Petitioners, the Court of Appeals' determination concerning the significance of low barriers to entry in the context of the "dangerous probability of success" element, does not present an issue appropriate for certiorari. *See Piccirillo v. New York*, 400 U.S. 548 (1971) (certiorari not appropriate when decision below rests on adequate alternative ground).

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[14] As noted above, the suggestion for rehearing *en banc* was denied by the Court of Appeals.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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December 24, 1984.